Supreme Court, U.S.
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NO. _____

SUPREME COURT
UNITED STATES OF AMERICA

October Term, 1994

"In re LEWIS RAY LAW" Petitioner

versus

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Respondent

PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

Lewis Ray Law
16 B Street
St. Albans, W.Va. 25177
(304) 722-5960

Petitioner, **Pro Se**

41pp

The Fourth Circuit Court of Appeals denied petitioner the statutory right to an appeal pursuant to Title 28 U.S.C. §1291, refusing to exercise the jurisdiction necessary to satisfy itself that the district court possessed subject-matter jurisdiction.

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OPINION AND ORDER BELOW

The unpublished written opinion of the Fourth Circuit Court of Appeals denying petitioner's collateral criminal appeal is reproduced and appears in Appendix A to this Petition. The order of the Fourth Circuit Court of Appeals denying petitioner's petition for rehearing is reproduced and appears in Appendix C to this Petition.

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals' judgment was filed on October 13, 1994, is reproduced and appears in Appendix A to this Petition. A timely petition for rehearing was filed on October 25, 1994, is reproduced and appears in Appendix B to this Petition. The petition for rehearing was denied on December 27, 1994, is reproduced, and appears in Appendix C to this Petition.

The jurisdiction of this Supreme Court as defined in Article III, §2, c1.2 of the United States Constitution is either "original" or "appellate." Suits brought in the district courts of the United States, which are not of such character as to be within the original jurisdiction of this Court under the United States Constitution, are cognizable by it only in the exercise of its appellate jurisdiction. Hence, its statutory authority to issue a writ of mandamus to the Fourth Circuit Court of Appeals can be constitutionally exercised only insofar as such writ would be in aid of its appellate jurisdiction. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

The criminal cause of action against petitioner in the District Court for the Southern District of West Virginia arose under Title 33 U.S.C. §§ 1251 et seq., "the Clean Water Act;" Laws of the United States; and thus, this Supreme Court has ultimate discretionary appellate jurisdiction by writ of certiorari pursuant to Title 28 U.S.C. §1254(1). Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

Therefore, this Honorable Supreme Court has the statutory jurisdiction pursuant to Title 28 U.S.C. §1651(a) to issue the writ of mandamus prayed for hereunder in aid of its appellate jurisdiction as granted by Article III, §2, c1.2 of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. §1291; Final decisions of district courts:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the

Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Title 33 U.S.C. §1319(c)(2)(A); Criminal penalties for knowing violations:

Any person who - knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State - shall be punished by a fine of not less than $5,000 nor more than $50,000 per day violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years or both.

STATEMENT OF FACTS

Petitioner was convicted for felony violations of "the Clean Water Act" under Title 33 U.S.C. §1251 et seq. A published opinion is reported as United States v. Law, 979 F.2d 977 (4th Cir. 1992), certiorari denied 113 S.Ct. 1844 (1993).

On June 13, 1994, petitioner timely filed a notice of appeal with the district and appellate courts from the final judgment entered by District Judge Elizabeth V. Hallanan on May 31, 1994, denying petitioner's motion to vacate pursuant to Title 28 U.S.C. §2255.

The district court's jurisdiction was challenged on several grounds. Initially, it was attached by showing that the indictment failed to allege an offense against the United States; and then, during the collateral proceeding, shifting directly to challenge the district court's subject-matter jurisdiction. The district court's failure to respond to the jurisdictional issues presented prompted petitioner to file, in the Fourth Circuit Court of Appeals, a petition for writ of mandamus (No. 93-5810) to do same. The Fourth Circuit Court of Appeals declined to issue the writ because the §2255 proceedings were not then yet concluded.

Despite the constant advancement of the jurisdictional issues, when filing its Findings and Recommendations, the Magistrate-Judge made no specific findings of fact or conclusions of law regarding said jurisdictional issues. (See the Magistrate-Judge's Findings and Recommendation, reproduced and appearing in Appendix D to this Petition.)

Again, despite petitioner's timely and specific objections to the Magistrate-Judge's failure to address the jurisdictional issue, the District Judge refused to address the jurisdictional issue and denied petitioner the statutory right to the de novo review thereof pursuant to Title 28 U.S.C. §636. (See District Judge Hallanan's final judgment, reproduced and appearing in Appendix E to this Petition.)

The sole issue raised on appeal was the district court's lack of subject-matter jurisdiction. (See Statement of Jurisdiction of Appeal No. 94-6676, reproduced and appearing in Appendix F to this Petition.)

The Fourth Circuit Court of Appeals' opinion, reproduced and appearing in Appendix A to this Petition, evinces that said Court has refused to address the subject-matter jurisdiction issue.

The district court's statutory grant of jurisdiction for felony violations of the Clean Water Act is pursuant to Title 33 U.S.C. §1319(c)(2)(A).

NO.

SUPREME COURT
UNITED STATES OF AMERICA

"In re LEWIS RAY LAW" Petitioner

versus

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

respondent

PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

ISSUE PRESENTATION

TO THE HONORABLE SUPREME COURT:

Petitioner Lewis Ray Law prays that this Honorable Court forthright issue a writ of mandamus to the United States Court of Appeals for the Fourth Circuit, compelling it to exercise jurisdiction.

Petitioner has the clear and undisputed right to an appeal pursuant to Title 28 U.S.C. §1291. Abney v. United States, 431 U.S. 651, 656 (1977).

The Fourth Circuit Court of Appeals is duty-bound to take and exercise jurisdiction in a case which comes before it properly appealed. Title 28 U.S.C. §1291; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1812).

On every writ of error or appeal, the first and fundamental question is that of jurisdiction. Mansfield, Coldwater & Lake Michigan R.R. Co. v. Swan, 111 U.S. 379, 382 (1884). Every federal appellate court has a special obligation to satisfy itself, not only of its own jurisdiction, but also that of the lower court in a case under review. FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990). And if jurisdiction is found to be lacking, the jurisdiction of the appellate court on review is limited to correcting the error of the trial court in entertaining the action. United States v. Corrick, 289 U.S. 435, 440 (1936).

Petitioner has no other statutory right to an appeal in any other federal court of appeals pursuant to Title 28 U.S.C. §1294.

Mandamus lies to enforce the right to an appeal, In re Jordan, 94 U.S. (4 Otto.) 248 (1877); In re Buder, 271 U.S. 461 (1926), and where there has

been "usurpation of judicial power." Labuy v. Howes Leather, 352 U.S. 249, 257 (1957).

EXCEPTIONAL CIRCUMSTANCES

The record conclusively shows that the district court lacked subject-matter jurisdiction.

Under Article III of the United States Constitution, "the judicial power of the United States ... is dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) ... and investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Cary v. Curtiss, 44 U.S. (3 How.) 236, 245 (1845); Lockerty v. Phillips, 319 U.S. 182 (1943).

Under Title 33 U.S.C. §1251(d), Congress declared that the Administrator of the Environmental Protection Agency shall administer the chapter. Prerequisite to a district court's subject-matter jurisdiction pursuant to Title 33 U.S.C. §1319 (c)(2)(A), criminal prosecution and punishment for knowing violations of the Clean Water Act, the Administrator has the mandatory duty to act by issuance of an abatement order. United States v. Phelps Dodge Corporation, 391 F.Supp. 1181 (D.C. Ariz. 1975).

It is this mandatory duty of the Administrator to act by issuance of an abatement order to petitioner or Mine Management Inc. of which the record is totally devoid.

CONCLUSION

Article VI, clauses 2 and 3 of the United States Constitution and Marbury v. Madison, supra, provide the authority which compels forthright issuance of the writ of mandamus for which petitioner prays.

Respectfully submitted,

Lewis Ray Law, **Pro Se**

CERTIFICATE OF SERVICE

I, Lewis Ray Law, hereby certify that, pursuant to Supreme Court Rules 29.3, 29.4(a) and 29.5, three (3) copies of the foregoing Petition for Writ of Mandamus have been served on the United States Court of Appeals for the Fourth Circuit, and one (1) copy of the foregoing Petition for Writ of Mandamus has been served on the Solicitor General, by placing same in envelopes with first-class postage prepaid into the United States mail addressed to:

United States Court of Appeals
for the Fourth Circuit
Tenth & Main Streets
Richmond, Virginia 23219

and

The Solicitor General
Department of Justice
Washington, D.C. 20530

on this day of 1995.

Lewis Ray Law, **Pro Se**

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. **94-6676**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

LEWIS R. LAW,

Defendant - Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. Elizabeth V. Hallanan, District Judge. (CR-91-225, CA-93-949-5)

Submitted: August 25, 1994 Decided: October 13, 1994

Before RUSSELL and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Lewis R. Law, Appellant Pro Se. Sanford Benjamin Bryant, Assistant United States Attorney, Huntington, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant appeals from the district court's order denying his 28 U.S.C. § 2255 (1988) motion. Our review of the record and the district court's opinion accepting the recommendation of the magistrate judge discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. United States v. Law, Nos. CR-91-225; CA-93-949-5 (S.D.W. Va. May 31, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process. The motion to file a pro se formal brief is granted.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

THE UNITED STATES,
Respondent, 94-6676

VS.

LEWIS RAY LAW,
Petitioner,

PETITION FOR REHEARING

This Petition for Rehearing is filed in accordance with Fed.RApp.P. 40, within (14) days from the entry date of October 13, 1994, of this Court's Judgment affirming the trial court.

This Petition is filed because this Court has failed to conduct the required de novo review; as to the existence of subject-matter jurisdiction in the trial court.

A court of Appeals is duty-bound to consider whether it possesses jurisdiction because mootness goes to the heart of federal courts' subject-matter jurisdiction under Article III, §2, cl.1 of the United States Constitution. Escobedo v. Estell, 655 F.2d 613 (5th Cir. 1981). (emphasis added).

Federal courts are courts of limited jurisdiction and a Court of Appeals has a constitutional obligation to satisfy itself that subject-matter jurisdiction is proper before it engages merits of appeal. Ziegler v. Champion Mortg. Co., 913 F.2d 228 (5th Cir. 1990). (emphasis added).

A defense of lack of subject-matter jurisdiction maybe asserted at any time, at either trial or appellate level, by either parties or the court. Arnfac Mortg. Co. v. Arizona Mall of Tempe, Inc., 583 F.2d 426 (9th Cir. 1978).

The right to challenge jurisdiction cannot be waived; and, questions of subject-matter jurisdiction are subject to plenary review by this Court. Taylor-Callahan-Coleman v. Dole, 948 F.2d 953 (5th Cir. 1991). (emphasis added).

The Attorney General is vested with the authority and responsibility to enforce all criminal statutes passed by Congress. Title 28 U.S.C. §516; In Re Subpoena of Perisco, 522 F.2d 41, 54 (2nd Cir. 1975). Although Congress may specifically limit the authority of the Attorney General with reference to civil or criminal litigation, there must be an express declaration of such intent and it may not be inferred. United States v. California, 332 U. S. 19 (1947).

"The Federal Water Pollution Control Act in §1(b) declares that it is federal policy 'to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution.' But the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters. While the States are given time to establish water quality standards, §10(c)(1), if a State fails to do so the federal administrator promulgates one. §10(c)(2). Section 10(a) makes pollution of interstate or navigable waters subject 'to abatement' when it 'endangers the health or welfare of any persons.' The abatement that is authorized follows a long-drawn-out procedure unnecessary to relate here. It uses the conference procedure, hoping for amicable settlements. But if none are reached, the federal administrator may request the Attorney General to bring suit on behalf of the United States for abatement of the pollution. §10(g)." Illinois v. City of Milwaukee, 406 U.S. 91, 102-03 (1972)(footnotes omitted)(emphasis added).

It is not the Attorney General who is charged with the administration and enforcement of the Clean Water Act, Title 33 U.S.A.§§ 1251 et seq., but rather, it is the sole function of the "Administrator" of the Environmental Protection Agency. Title 33 U.S.A. §§ 1251 (d). And this Court holds that judicial review is unavailable under the Clean Water Act absent pre-enforcement action taken by the Administrator. Southern Pine v. United States, 912 F. 2d 713 (4th Cir. 1990).

Title 33 U.S.A. § 1369(b)(2) provides:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in a civil or criminal proceeding for enforcement.

Quite clearly, 1251(d) and § 1369(b)(2) are an explicit withdrawals of jurisdiction from the Attorney General's authority to initiate and go forward with a civil or criminal investigation and prosecution of alleged violations of the Clean Water Act without referral by the Administrator; and thus, the respondent's lack of "standing." Because standing is an element of the constitutional requirement of a "case or controversy," lack of standing deprives the trial court of subject-matter jurisdiction and therefore objections to standing are never waived and must be raised by an appellate court sua sponte. In Re Weaver, 632 F.2d 461 (5th Cir. 1980).(emphasis added).

CONCLUSION

The burden of establishing a federal court's jurisdiction rests upon the party seeking to invoke it and cannot be placed upon the adversary who challenges it. Carson v. Dunham, 121 U.S. 421, 425 (1887). And in relieving the respondent of its burden, this Court usurps jurisdiction which is not given; and commits treason to the United States Constitution. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 at 404 (1821).

LEWIS RAY LAW

CERTIFICATE OF SERVICE

I, Lewis Ray law, hereby certify that a true and correct copy of this Petition for Rehearing has been served upon the respondent, U.S. Attorney, S. Benjamin Bryant.

Dated: 10/25/94

/s/ Lewis Ray Law

LEWIS RAY LAW

cc: Ronald Rahall Tweel, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 27, 1994

No. 94-6676
CA-93-949-5
CR-91-225

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LEWIS R. LAW

Defendant - Appellant

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition.

For the Court,

/s/ Bert M. Montague

CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY

LEWIS R. LAW,

Movant,

v. CRIMINAL NUMBER: 5:91-00225
(CIVIL ACTION NO. 5:93-0949)

UNITED STATES OF AMERICA,

Respondent.

FINDINGS AND RECOMMENDATIONS

Lewis Ray Law, a federal prisoner, filed a Motion to Dismiss Indictment for Being Illegal and for Its Failure to Charge an Offense Against the United States on September 22, 1993. In his motion, Defendant states that "[t]his motion and allegations are in the form dictated by the Rules Governing Section 2255 proceedings for the United States District Courts," and then proceeds to provide, in paragraph form, the same information which is requested on the standard Section 2255 motion form. The District Court interpreted this motion as a motion filed pursuant to Title 28, United States Code, Section 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. By Order entered October 4, 1993, the District Court directed the Clerk to file the document as a § 2255 motion and referred the civil action to this United States Magistrate Judge to consider the pleadings and evidence herein and to submit proposed findings of fact and recommendations for disposition.

Currently pending before the court are Defendant's Motion with accompanying memorandum and the Response of the United States. After review of the Motion and memorandum, the Response, and the transcripts of trial court proceedings, and pursuant to Rule 8, Rules Governing Section 2255 Proceedings in the United States District Courts, the Court finds that an evidentiary hearing is not required, and hereby submits to the District Court findings of fact and recommendations for disposition.

The following facts are condensed from those set out in the opinion of the Court of Appeals in this case, United-States v. Law, 979 F.2d 977 (4th Cir. 1992), cert. denied, 113 S.Ct. 1844 (1993). Defendant and his corporation purchased an old coal preparation plant, coal refuse ("gob piles") and a water treatment plant from the New River Company in 1977. Id. at 978. The purpose of the water treatment plant was to reduce the acid level and metal content of water draining from the gob piles. Id. At the time Defendant purchased the plant, it required an NPDES (National Pollution Discharge Elimi-

nation System) permit to authorize drainage of water into Wolf and Arbuckle Creeks, which Defendant made no attempt to obtain. Id. Defendant was convicted for violating the Clean Water Act, and appealed this conviction on two grounds: that the Jury was erroneously instructed on the law and that the trial court abused its discretion in barring certain testimony. Id. Defendant did "not contest that [he] added untreated acid mine drainage to Wolf and Arbuckle Creeks from the collection and settling pond, respectively, knowing that [he] lacked the requisite NPDES permit." Id. Both grounds of appeal were rejected by the Court of Appeals.

ISSUES

Defendant raises the following issues in his motion:

III. Grounds On Which Movant Is Beinq Beld Unlawfully

24. The Indictment Is Illegal
    a. See Memorandum

25. The Indictment Fails To Charqe An Offense
    a. See Memorandum

26 Improper Jury Instructions
    a. See Memorandum

27. Ineffective Assistance of Counsel At All Critical Stares
    a. See Memorandum

28. The Fraud UPon The Court
    a. See Memorandum

(Docket #79, Def.'s Mot. at 8-9.) The Court notes that of the grounds raised by Defendant here, none was previously argued on direct appeal.

Claims of a nonconstitutional nature which were not raised on appeal may not be raised in a collateral proceeding. Stone v. Powell, 428 U.S. 465, 477 n.10 (1976); Sunal v. Large, 332 U.S. 174 (1947); United v. Emmanuel, 869 F.2d 795 (4th Cir. 1989). Where the claims asserted are of a constitutional nature, failure to raise them on direct appeal does not bar post-conviction relief. Davis v. United States, 417 U.S. 333, 345 n*15 (1974). The proper standard for constitutional claims which were not raised on direct appeal is the cause and actual prejudice standard of United States v. Frady, 456 U.S. 152 (1982). In the instant case, the United States has specifically declined to raise any argument of waiver or procedural default, based upon the belief that all of Defendant's assertions are without merit.

The court agrees that Law's grounds for relief are meritless. The court also is obliged to find that Law has failed to establish cause and actual preju-

dice, as required by Frady, to excuse his failure to raise these issues (except for number 27) on direct appeal. Of course, a claim of denial of effective assistance of counsel is properly raised in a § 2255 motion. Despite Law's waiver of review, each ground raised by him will be addressed, in the order presented.

The Indictment Is Illegal

In his memorandum, Defendant alleges that a review of the face of the indictment and the grand jury transcripts reveals that "all the essential elements of the offense alleged were neither contained in the charging instrument, nor submitted to the grand jury for its consideration in determining probable cause that there existed a factual basis on which to indict movant." (Docket #80, Def.'s Mem. in Supp. of Mot at 14-15.) Defendant asserts that the essential elements of 33 U.S.C. § 1311 are:

(1) That defendants have discharged a pollutant from a point source into navigable waters of the United States.

(2) And that such discharge does not comply with a permit condition.

(Def.'s Mem. in Supp. at 15.) Defendant alleges that:

> As the record reflects, not contained or alleged any where on the face of the charging instrument is the essential element of 33 U.S.C. §1311(a) that "such discharge does not comply with a permit condition." See State of Mich. v. City of Allen Park, 501 F.Supp 1007 at 1014 (E.D. Mich. S.D. 1980).

(Def.'s Mem. in Supp. at 15.) Defendant's concludes his argument on this issue with the following assertions:

> The indictment was doubly illegal. First, with the coupling of the alledged [sic] real offense in ¶ 7 (minus the (2nd) essential element) and then the inclusion of the imaginary elements of non-criminal statutes in ¶ 9, for the purpose of achieving the blanketing effect in all counts of the indictment, the untrue bill becomes even more frustrated. Movant submits that it now suffers from artificial duplicity, and thus allows a petit jury to convict a defendant upon a factual basis that has mingled and modified some true, and some false, essential elements. Hence, an artificial-hybrid offense charged, and is as illegal as it can be on its face.
>
> Secondly, the face of the record is clear, the grand jury did not return a True Bill. The grand jury was kept uninformed,

> (overreached) and returned a bias untrue bill. And before jurisdiction attaches in a particular "case" there must be a "suit instituted according to the regular course of judicial procedure."

(Def.'s Mem. in Supp. of Mot. at 17.) Defendant concludes that this "lack of indictment" resulted in the District Court not having jurisdiction, and that the Court is required to Dismiss the indictment. (Def.'s Mem. in Supp. of Mot. at 17-18.)

The United States asserts in its Response that "[t]his argument apparently is based upon defendant's failure to understand the federal Clean Water Act (CWA), 33 U.S.C. 1251 et seq., and misreading of the indictment." (Docket #84, Response of the United States at 1.) The United States notes that:

> The statute makes it illegal for any person to discharge a pollutant into a water of the United States from a point source, unless that person has an NPDES permit and the discharge is in compliance with the terms of that permit. 33 U.S.C. 1311(a); 1342. . . . Civil and criminal penalties are established for those who violate the act. 33 U.S.C. 1319(c)(2).

(Response of the United States at 2-3.) The United States further states that:

> The indictment in this case charged defendant with discharging pollutants without an NPDES permit. See paragraph 9, indictment. This is so because the defendant did not possess an NPDES permit; never applied for one; refused to apply for one, even though state authorities ordered him to apply. He did not believe that "just any landowner" was subject to the permit requirements. Joint Appendix 444.

(Response of the United States at 3.) The United States concludes "that the indictment precisely charged defendant with conduct prohibited by the CWA." (Response of the United States at 3.)

> 33 U.S.C. § 1311 provides in relevant part:
>
> (a) Illegality of pollutant discharges except in compliance with law
>
> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Section 1342 provides for the issuance of NPDES permits for the discharge of pollutants. 33 U.S.C. § 1342. As noted by the Fourth Circuit in Law, 979 F.2d at 978, "[u]nder the CWA, it is a felony to (a) knowingly (b) discharge (c) a pollutant (d) from a point source (e) into a navigable water of the United States (f) without, or in violation of, an NUDES permit."

Paragraph nine of the indictment returned by the grand jury in the instant case alleges that Defendant:

> knowingly discharged pollutants, that is, acid water with pH level less than or equal to 4.0 and containing high levels of iron and/or manganese, from point sources, into the navigable waters of the United States, as set forth below, that is, Wolf Creek and/or Arbuckle Creek, without a National Pollution Discharge Elimination Permit, in violation of Title 33, United States Code, Sections 1311 and 1342 . . . .

Defendant's contention that the indictment is defective is apparently based upon his belief that the indictment must contain a phrase indicating that a condition of an NPDES permit had been violated. However, discharge without a permit, where one is required, is equally violative of the statute.

In view of the unambiguous language of the indictment, the Court finds that Defendants contention that the indictment is defective because it fails to include the allegedly essential element that "such discharge does not comply with a permit condition" is not persuasive. The Court finds that while it is true that the indictment does not allege that Defendant's actions did "not comply' with a condition of a permit, this is not an essential element, need not be alleged, and is irreievant in light of the fact that Defendant discharged the pollutants without obtaining the required NPDES permit. The Court finds that there are no defects on the face of the indictment, and that there is no merit to Defendant's contention that the District Court lacked jurisdiction.

The Indictment Fails to Charge an Offense

Defendant asserts that Counts 1 through 18 of the indictment failed to embody:

> any of the essential elements of the offenses charged; statement of facts, circumstances; or information sufficient enough to protect against former conviction, acquittal, or future prosecution; nor, any information that would allow movant to know the true nature of the offenses charged, and to both allow this Court to determine the sufficiency of the charges and determine that movant's conduct fell within the actual prosecutable conduct of 33 §§ 1311(a).

(Def.'s Mem. in Supp. of Mot. at 19.)

The United States responds that:

> The indictment sets forth in considerable detail the method and manner of the offenses charged; the applicable legal basis for the charges; times, dates and places; and identifies all elements of a CWA violation; the persons (defendants); the discharges; the nature of the pollutants (acid mine water with low pH and high metal levels); the point sources (the water treatment systems at the site); without an NPDES permit; and did so knowingly.
>
> Following introductory paragraphs setting forth considerable detail concerning the offending actions, paragraph 9 tracks the language of the statutes. After this, each count is listed by number, and specifies the date of the offending discharge and which of two creeks were involved. This follows well established federal criminal practice in the drafting of indictments involving a common set of facts, but with different dates on which recurring offenses are charged, as in, for example, mail and wire fraud indictments.

(Response of the United States at 3-4.) The United:States asserts the indictment served to comply with Federal Rule of Criminal Procedure 7(c), and the Constitutionally imposed functions of notice and double jeopardy.

A review of the indictment reveals that, as asserted by the United States, it sets forth the required information charging the offenses, and is drafted following well established federal criminal practice. The Court finds that the indictment satisfies Rule 7(c), meets notice and double jeopardy requirements, and that Defendant's allegation that the indictment fails to charge an offense has no merit.

Improper Jury Instructions

Attached to Defendant's memorandum are the jury instructions submitted at trial by the government. Defendant's sole contention on this issue is his unsupported statement that "[w]hen compared against the actual statutes, it is clear to see that these instructions have been intentionally concocted, and this Court committed clear error in charging the same." (Def.'s Mem. in Supp. Of Mot. at 22.) The United States responds that "[f]ollowing standard federal practice, the instruction attached as Exhibit A to the defendant's memorandum summarizes the law upon which the charges in the indictment are founded. Review of the instruction as given demonstrates the accuracy of the charge." (Response of the United States at 5.) The United States also con-

tends that the instruction attached as Exhibit B is a correct statement of the essential elements of violation of the Clean Water Act, and that Defendant has articulated neither the manner in which the instructions constitute error, nor what prejudice he has suffered. (Response of the United States at 5.)

After review of the instructions attached to Defendant's memorandum, the Court finds that the instruction attached as Exhibit A summarizes the statutes involved, pursuant to the statutory scheme, in a violation of Section 1319(c)(2), and is an accurate statement of the law. The Court finds that the instruction attached as Exhibit B incorporates the essential elements of a Clean Water Act violation, as embraced in the statutory provisions. The Court finds that the charge to the jury was accurate, and that this allegation has no merit.

Ineffective Assistance of Counsel at All Critical Stages

After citing law relating to the right to effective assistance of counsel, Defendant then makes the bare assertion that "[t]he record reveals that the proposed jury instruction for the defense are totally devoid of any essential elements of the alleged offense." (Def.'s Mem. in Supp. of Mot. at 22.) Defendant asserts that his counsel "acted more on the behalf of the prosecution than the defense." (Def.'s Mem. in Supp. of Mot. at 22.) The United States responds that Defense counsel arduously pressed their case at trial and on appeal, and offered instructions on Defendant's defenses to the District Court, and that Defendant has not shown that his counsel were ineffective in this regard. (Response of the United States at 6-7.) The United States points out that Defendant provided no explanation for his allegation that defense counsel acted on behalf of the prosecution, and that he has not shown that his counsel's performance fell below an objective standard of reasonableness. (Response of the United States at 7.)

The Supreme Court addressed the right to effective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Court adopted a two-pronged test for determining whether a defendant received adequate assistance of counsel. Id. The first prong is competence; Petitioner must show that the representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-91. There is a strong presumption that the conduct of counsel was in the wide range of what is considered reasonable professional assistance, and a reviewing court must be highly deferential in scrutinizing the performance of counsel. 466 U.S. at 688-89.

The second prong is prejudice; "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

Defendant has not shown any facts to indicate that the representation fell below an objective standard of reasonableness. It appears that his claim of ineffective assistance is based primarily upon his allegation that the proposed jury instructions of defense counsel did not contain the essential elements of the offense. However, this is not evidence of ineffective assistance, especially in light of the fact that the instructions offered by the United States adequately and properly listed the essential elements of the charged offense, and the assertion of the United States that the instructions offered by defense counsel presented defenses to the charged conduct. The Court finds that Defendant's claim of ineffective assistance of counsel is not supported by the record, and has no merit.

Fraud Upon the Court

Defendant argues that the absence of the words "effluent limitations from the entirety of the record constitutes a "fraud upon the court," a term which Defendant characterizes as an Attempt to interfere with judicial machinery performing task of impartial adjudication." (Def.'s Mem. in Supp. of Mot. at 23.) Defendant asserts that "[t]here is no telling how deep the taint runs in the Courts, or just how many links there are in this chain of chicanery." (Def.'s Mem. in Supp. of Mot. at 23.) The United States responds that Defendantts only allegation with respect to this assigned error is the absence of the words "effluent limitations," and that:

> This may be a reiteration of defendant's prior argument concerning elements of a CWA violation. If so, that argument has been addressed: it is unlawful to discharge either without an NPDES permit, or in violation of a permit. Defendant was prosecuted for the former because he did not possess a permit. Thus the phrase "effluent limitations' is not recurrent, until now, in the writings of this case.

(Response of the United States at 7.)

33 U.S.C § 1362, the definitional section of the Act, provides as follows:

> (11) The term "effluent limitation demeans any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents -which are discharged from point sources into navigable waters, the waters of the contiguous zone,-or the ocean, including schedules of compliance.

Restrictions concerning effluent limitations are established by the permit issued in each particular circumstance. Defendant did not possess a permit. Thus the phrase effluent limitations was not relevant in the instant case

because Defendant did not possess a permit, and could not have violated the effluent limitation restrictions of a permit in the absence of a permit. The Court finds that Defendant's claim that there has been a "fraud upon the Court" has no merit.

RECOMMENDATION FOR DISPOSITION

It is respectfully recommended, for the foregoing reasons, that Petitioner's Motion to Vacate Sentence under § 2255 be DENIED.

The parties are notified that these Findings and Recommendation are hereby FILED, and a copy will be submitted to the Honorable Elizabeth V. Hallanan. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), Rule 8(b) of the Rules Governing Section 2255 Cases in the United States District Courts, and Rules 6(e) and 72(a), Federal Rules of Civil Procedure, the parties shall have thirteen (13) days from the date of filing of these Findings and Recommendation within which to file with the Clerk of this Court, written objections, identifying the portions of the Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208, 104 S. Ct. 2395, 81 L. Ed. 2d 352 (1984). Copies of such objections shall be served on opposing parties, Judge Hallanan, and this Magistrate Judge.

The Clerk is directed to file these Findings and Recommendation and to mail a copy of the same, by certified mail, return receipt requested, to Defendant Lewis Ray Law and to counsel of record.

Date: Dec. 29, 1993

/s/ Mary S. Feinberg

Mary S. Feinberg
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

UNITED STATES OF AMERICA

v. Criminal Action No. 5:91-00225
Civil Action No. 5:93-0949

LEWIS R. LAW

ORDER

Lewis R. Law, a federal prisoner, (hereinafter "defendant") filed a Motion To Dismiss Indictment For Being Illegal And For Its Failure To Charge An Offense Against The United States which was interpreted as a motion pursuant to Title 28, United States Code, Section 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody.

Pursuant to Title 28, United States Code, Section 636(b)(1)(B), the motion was referred to the Honorable Mary S. Feinberg, United States Magistrate Judge, for proposed findings and recommendations. The United States filed its written response to defendant's motion and the Magistrate Judge submitted her findings of fact and recommendations for disposition.

The defendant has filed timely objections to the Magistrate Judge's report. Therefore, this court reviews the motion *de novo*.

BACKGROUND

The defendant and his corporation, Mine Management, Inc., (MMI) were charged in an eighteen count indictment with violating the Clean Water Act, 33 U.S.C. § 1319(c)(2), ("CWA") by knowingly discharging polluted water into Wolf and Arbuckle Creeks in Fayette County, West Virginia without a National Pollution Discharge Elimination System ("NPDES") Permit.

In 1980 this defendant, through his corporation, Mine Management, Inc.,[1] purchased 241 acres from The New River Company (NRC). However, prior to purchasing this property, the defendant leased certain property rights to the same 241 acre tract of land, including the coal refuse piles, only for the purpose of removing and processing as well as marketing coal from slurry ponds and refuse piles.

This purchase included an aged coal preparation plant; coal refuse (more commonly referred to in the mining related industry as a "gob pile");[2] a wa-

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[1]*The defendant was the sole stockholder, officer and director of this corporation.*

ter treatment system installed by NRC in the late 1970s; buildings; and ponds.

The refuse piles were formed as a result of mining operations and coal processing which began decades before the defendant

Water collects in and around the coal refuse pile and becomes very acidic as it percolates through the coal refuse pile. This acid water contains high concentrations of iron and manganese. The acid water then discharges, or leaches, out of the coal refuse pile and enters the headwaters of Arbuckle and Wolf Creeks, primarily draining to Wolf Creek.

The purpose of the water treatment system installed by NRC was to neutralize the acid level in the water. NRC held an NPDES permit which authorized it to discharge the treated water into the headwaters of Wolf and/or Arbuckle Creeks. However, NRC was cited several times by the West Virginia Department of Natural Resources (DNR) for unpermitted discharges.

The evidence at trial was that the defendant knew about the environmental problems when his corporation purchased the property, primarily because of the lease from NRC, his meetings with DNR officials and conversations with NRC agents; that he was directed to obtain an NPDES permit, but did not comply; that the discharges came from point sources on his property; that the discharges constituted pollutants; and the discharges were to waters of the United States (Wolf and Arbuckle Creeks, tributaries of The New River).

The essential elements of the offenses are: a person knowingly discharged a pollutant from a point source into a navigable water of the United States without, or in violation of, an National Pollutant Discharge Elimination System permit. See 33 U.S.C. US 1311(a), 1319(c)(2) and 1342(a); See *also* 33 U.S.C. S 1362(12) defining "discharge" as "any addition of any pollutant to navigable waters from any point source." (Emphases added.) A "Persons is defined to include both individuals and corporations. 33 U.S.C. S 1362(5).

The defendant argued that the pollutants originated at sources other than his property and that he did not do anything to create or add to the pollution.

The defendant and MMI were convicted on sixteen of the eighteen counts.[3] He appealed his convictions to the United States Court of Appeals for the Fourth Circuit. On appeal, he raised two grounds: (1) that the trial

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[2]*The "gob pile" covers approximately 20 acres of ground which is part of the 241 acre tract acquired by Mine Management, Inc.*

[3]*The Court dismissed count three because "there's just absolutely no evidence in support of any sample having been taken that day." The Court also dismissed count sixteen because the sample taken on that day was tested by a DNR agent with his on-site pi mechanism and not taken to the laboratory for more scientific testing. Trial Transcript, Volume IV, at 21.*

court instructed the jury erroneously on the law governing their case; and (2) that the court abused its discretion in barring evidence regarding New River's alleged policy of concealing preexisting environmental problems from prospective purchasers of its property. The Fourth Circuit rejected both grounds. Additionally, review was denied by the United States Supreme Court, 113 S.Ct. 1844 (1993).

ISSUES RAISED IN § 2255 MOTION

The defendant raises the following issues in his § 2255 motion:

(a) the indictment is illegal;

(b) the indictment fails to charge an offense against the United States:

(c) improper jury instructions;

(d) ineffective assistance of counsel; and

(e) fraud upon the courts

LEGAL DISCUSSION

These issues could have been but were not raised on direct appeal. However, the law is clear that the proper forum for a claim of ineffective assistance of counsel is a § 2255 motion.

Because grounds (a), (b), (c), and (e) were not raised on direct appeal, the standard of review of the defendant's motion is the "cause and actual prejudice" standard. *United States v. Frady*, 456 U.S. 152, 167-68. Under the *Frady* rule, to obtain collateral relief based upon trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) "cause" excusing his double procedural default, and (2) "actual prejudice" resulting from the errors of which he complains.

Until he filed his objections to the Magistrate's Findings and Recommendations, the defendant had not said what "caused" his failure to raise these issues on direct appeal:

> The 'cause' [sic] for not making a contemporaneous objection at trial and not raising this claim on direct appeal, is that movant's trial and appellate counsel were constitutionally ineffective.

Objections, Page 11.[4]

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[4]*The defendant was represented by retained counsel at the trial and appellate stages. However, the defendant retained different counsel to represent him in his Supreme Court petition.*

In order to show that the ineffectiveness of his counsel, the defendant must meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, [defendant] must demonstrate that [counsel] was not functioning as "counsel" as guaranteed by the sixth amendment of the Constitution. Second, he must prove that the deficient performance "deprive[d] [him] of a fair trial, a trial whose result is reliable." *Strickland*, at 687.

Because the defendant now contends that the "cause" for his failure to raise the issues on direct appeal was the ineffectiveness of his Retrial and appellate counsel," the Court will confine its review to the single issue of ineffective assistance and consider those claims raised under subparagraphs (a) (b) (c) and (e) of defendant's motion in support thereof.

INEFFECTIVE ASSISTANCE--ANALYSIS AND FINDINGS

(a) The Indictment Is Illegal

In his original motion and accompanying memorandum, the defendant argues that the indictment lacked the essential elements and that the elements were not submitted to the grand jury for consideration in determining probable cause that a factual basis existed on which to indict him. He also contends that the indictment was doubly illegal, artificial duplicity and that it is illegal on its face; that the grand jury did not return a true bill; that the grand jury was kept uninformed and returned a bias untrue bill. Therefore, he concludes, that because of this "lack of indictment," the district court did not have jurisdiction and is required to dismiss the indictment.

This Court has again reviewed the indictment and determines that the elements of the offenses charged against this defendant were all stated in the indictment:

> 9. [ ] On or about the dates set forth below, at or near Summerlee, Fayette County, West Virginia, and within the Southern District of West Virginia, defendants Lewis R. Law and Mine Management, Inc. knowingly discharged pollutants, that is, acid water with a pH level less than or equal to 4.0 and containing high levels of iron and/or manganese, from point sources, into navigable waters of the United States, as set forth below, that is, Wolf Creek and/or Arbuckle Creek, without a National Pollution Discharge Eli ma nation System Permit, in violation of Title 33, United States Code, Sections 1311 and 1342.

Indictment, at 3. (Emphasis added.)

"Under the CWA, it is a felony to (a) knowingly (b) discharge (c) a pollutant (d) from a point source (e) into a navigable water of the United States

(f) without, or in violation of, an NPDES permit." *United States v. Law*, 979 F.2d 977 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1844 (1993).

The indictment against this defendant recited all of the essential elements. His attempt to convince this Court that the indictment is illegal, insufficient and/or defective, fails. His obvious misunderstanding of the statute and his muddled argument that a violation of a condition of an NPDES permit ii an element of the offense and that this element was omitted from the indictment is absurd in this case--there was no permit because the defendant repeatedly refused, after being noticed, to apply for and obtain a permit. Nonetheless, his refusal to obtain a permit does not free him from his legal obligations under the CWA.

The defendant also argues that 33 U.S.C. §§ 1251 *et seq.* (the Clean Water Act) are civil by nature and are required to be initiated by complaint after state remedies have been exhausted. The Clean Water Act, *supra*, was amended to include felony (criminal) provisions for knowing violations of the Act that occur after March 1, 1987. The defendant was given ample opportunity to avoid criminal prosecution but failed to do so.

Defendant's trial counsel filed a motion to dismiss the indictment on the basis that the pollutant, acid mix

originated from the subsurface of the property owned by the defendant as a result of previous mining activities of NRC. However, for the reasons set forth in this Court's written Order of November 18, 1991, the motion was denied. In that Order, the Court found:

> [T]he indictment sufficiently states the charges against the Defendants, in that it does state a crime for which they might be convicted and that it does properly charge an offense under the Federal Clean Water Act. Furthermore, "a conviction may be sustained on the basis of a statute or regulation other than that cited."

November 18, 1991 Order, at 4.

Again, this Court finds that the indictment is sufficient, is not illegal and the motion was properly denied. The defendant's argument that this Court (district court) lacked jurisdiction and therefore, should have dismissed the indictment, is untenable.

> (b) <u>The Indictment Fails to Charge an Offense Against the United States</u>

The defendant says that counts 1 through 18 do not include:

> "any of the essential elements of the offense charged; statement of facts, circumstances; or information sufficient enough to protect against former conviction, acquittal, or future prosecution; nor, any information that would allow movant to know the true nature of the offenses charged, and to both allow this Court to determine the sufficiency of the charges and determine that movant's conduct fell within the actual prosecutable conduct of 33 §§ 1311(a) [sic].

Defendant's Memorandum in Support of Motion, at 19.

However, in his objections, the defendant contends that the second essential element necessary to sustain a conviction for a violation of 33 U.S.C. § 1311(a), is absent from the face of the charging instrument, and in such case, the indictment fails to allege an offense. The second element, as provided by statute, is "discharge."

Unequivocally, the indictment against this defendant complies with Rule 7(c)(1) of the Federal Rules of Criminal Procedure. Prior to its ruling on defendant's pretrial motion to dismiss the indictment, this Court expended a great deal of time listening to oral argument on the motion, researching the CWA, as well as scrutinizing the charges in the indictment. As part of this review, the Court once again reviewed the indictment and Rule 7(c)(1) and finds no error.

The Court believes that it has adequately addressed the statute that this defendant was convicted of violating in its Analysis and Findings under (a) (The Indictment Is Illegal) and sees no reason to further illustrate the legality of the indictment.

(c) Improper Jury Instructions

In defendant's memorandum to his s 2255 motion, he attempts to combine this issue with that of ineffective assistance of counsel. Under the "improper jury instructions," he asserts that "these instructions have been intentionally concocted, and this Court committed clear error in charging the same." Under "The Ineffective Assistance Of Counsel At All Critical Stages" claim, he asserts that "[t]he record reveals that the proposed jury instructions for the defense are totally devoid of any essential elements of the alleged offense . . . that defense counsel acted more on the behalf of the prosecution than defense."

The defendant argues that the "cause" for his procedural default is that his counsel were constitutionally ineffective.

> [T]hese two issues are coupled because, as recognized by the Magistrate, they are one in the same, and as shown below, coupled with all the above said and shown, the Magistrate's finding that these claims are meritless, are as well erroneous. The improper jury instructions, most specifically, the preclusion of an instruction that would have required that the discharges alleged were in violation of a permit condition, were not contemporaneously objected to at trial nor raised and argued on direct appeal.

Movant's Objections, at 10.

The challenged jury instruction is a correct statement of the law and because the defendant never obtain a permit, the United States was not required to prove that the discharges were in violation of any condition of a permit.

Consequently, defendant' claim of improper jury instruction is unfounded.

(e) Fraud Upon the Courts

Essentially, this claim is based upon the omission of the words "effluent limitations" which the defendant claims do not appear in the record of this case. Because "[a] review of the record will reveal that the entire record is totally deviod (sic) of these two words he asserts that "[t]here is no telling just how deep the taint runs in the Courts, or just how many links there are in this chain of chicanery." *Defendant's Memorandum*, at 23.

In his objections, the defendant argues that:

> By now this court should be crystal clear that in order for one to violate 33 USC s 1311(a), the issuance of an NPDES permit is a prerequisite-. . . . Thus both the Magistrate's and the government's position that 33 USC S 1311(a) can be violated with or without an NPDES permit, is clearly erroneous.

There is no factual basis or legal authority to support this argument .

CONCLUSION

The defendant failed to meet the "cause" prong of the *Frady* dual standard. The Court is confident that the ineffective assistance claim was just a subterfuge devised by the defendant to relitigate his case. Because he has failed to show cause for his procedural default, it is unnecessary for the Court to address the *Strickland* test.

For the foregoing reasons, the Court finds that the defendant is not entitled to the relief he requested and his § 2255 motion is denied.

The Clerk is directed to mail a copy of this Order to the defendant, pro se, the United States Attorney for the Southern District of West Virginia, and the Honorable Mary S. Feinberg, United States Magistrate Judge.

IT IS SO ORDERED this 31st day of May 1994.

ENTER:

/s/ Elizabeth V. Hallanan

ELIZABETH V. HALLANAN
United States District Judge

APPENDIX F

IV. Statement of Jurisdiction

Jurisdiction over the subject-matter in the court below is disputed, which is the substance of this appeal, and discussed infra.

Appellant was charged by indictment for violations of the Clean Water Act (CWA), eighteen (18) Counts, in violation of 33 U.S.C. § 1311(a). The government invoked the trial court's original jurisdiction under 18 U.S.C. § 3231.

This is an appeal of right from the final judgment entered by District Judge Elizabeth V. Hallanan on May 31, 1994 and received by appellant on June 7, 1994, denying appellant's Motion to Vacate, Set Aside or Correct pursuant to 28 U.S.C. § 2255. This appeal was timely filed on June 13, 1994, within the sixty (60) day period allowed by Fed.R.App.P. 4(a)(1).

Therefore, the appellate jurisdiction of this Court is invoked under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

APPENDIX G

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107-4431

FEB 13 1995

Mr. Thomas T. Kirk, P.E.
Route 2, Box 340
Charleston, WV 25314

Dear Mr. Kirk:

This is in reply to your request for a written followup of my telephone response to you regarding your letter of January 12 1995 about the New River Company and Mine Management, Inc.

You requested that the Environmental Protection Agency provide you with "any notices of violations or administrative orders issued by EPA to Mine Management and/or Lewis R. Law for violations of The Clean Water Act or any notice to the State of West Virginia directing the State's EPA to take action against the above mentioned parties." As I had indicated to you during our conversation, our records do not show that any notices or orders referred to above have ever been issued by the Environmental Protection Agency.

If you have any questions, or if I can be of further aid, please contact me at (215) 597-4313.

Sincerely,

Daniel D. Sweeney
Environmental Engineer
Permits Enforcement Branch